

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
November 27, 2007 Session

**STATE OF TENNESSEE v. HEATHER MASSENGILL**

**Appeal from the Criminal Court for Bradley County**  
**No. M-05-074     Carroll L. Ross, Judge**

---

**No. E2006-02602-CCA-R3-CD - Filed May 12, 2008**

---

The defendant, Heather Massengill, appeals as of right her jury convictions for conspiracy to commit aggravated robbery, two counts of facilitation of attempted aggravated robbery, and facilitation of felony murder. The trial court sentenced the defendant as a Range I, standard offender to concurrent sentences of four years for the conspiracy count, three years for one facilitation of attempted aggravated robbery, five years for the other facilitation of attempted aggravated robbery, and seventeen years for the facilitation of felony murder, for a total effective sentence of seventeen years. On appeal, she raises three issues for this court's review: (1) whether the trial court erred in denying a motion to suppress the statement of her codefendant, (2) whether the trial court erred in admitting a copy of a compact disc recorded statement of another codefendant after the original recording had been destroyed, and (3) whether the trial court erred in excluding evidence of an outstanding warrant for the purpose of impeaching a codefendant. The state contends that the defendant's appeal should be dismissed for failure to file a timely motion for new trial and notice of appeal. We conclude that the issues alleged on appeal are waived because the defendant failed to file a timely motion for a new trial. We further conclude that the defendant has failed to seek a waiver of the timely filing of the notice of appeal in this case. Therefore, the appeal shall be dismissed.<sup>1</sup>

**Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Sally Love, Cleveland, Tennessee, attorney for appellant, Heather Massengill.

Robert E. Cooper, Jr., Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; Kristie Luffman, Sandra Danaghy, Stephen Crump, and John Williams, Assistant District Attorneys General, attorneys for appellee, State of Tennessee.

---

<sup>1</sup> We do note that the trial court imposed a five year, Range I sentence for count three. Facilitation of attempted aggravated robbery is a Class D felony and is subject to a sentence of two to four years at Range I. Tenn. Code Ann. section 40-35-112(a)(4). Therefore, the five year sentence exceeds the maximum allowed for that range classification of that offense. We advise that the trial court "may at any time correct clerical mistakes in judgments" pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure.

## OPINION

The record reflects that the judgments of conviction were entered on April 12, 2006. The defendant failed to file a motion for new trial until June 19, 2006, thirty-eight days beyond the filing deadline. Tenn. R. Crim. P. 33(b). It appears from the record that the motion for new trial was filed late by agreement as indicated by an agreed order entered by the trial court on June 9, 2006. The motion for new trial was heard on September 16, 2006, and denied by written order on November 7, 2006.<sup>2</sup> Appellate counsel was appointed on November 7, 2006, and filed a notice of appeal on December 5, 2006.

The thirty-day filing deadline of a motion for new trial is mandatory, jurisdictional, and may not be extended. Tenn. R. Crim. P. 45(b); State v. Martin, 940 S.W.2d 567, 569 (Tenn. Crim. App. 1997). Consequently, “[a] motion for new trial which is not timely filed is a nullity.” State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). Subsequent review or considerations by the trial court or agreements of parties to hear a late-filed motion will not validate the motion for the purposes of appellate review. Id.; State v. Davis, 748 S.W.2d 206 (Tenn. Crim. App. 1987). Failure to file a timely motion for new trial will result in the waiver of all appellate issues that would result in the granting of a new trial. Dodson, 780 S.W.2d at 780; State v. Williams, 675 S.W.2d 499 (Tenn. Crim. App. 1984). Therefore, we conclude that the issues raised by the defendant on appeal are waived. We acknowledge that this court cannot review those grounds upon which a new trial was sought, but may review those issues which would result in dismissal. Tenn. R. App. P. 3(e); Williams, 675 S.W.2d at 501; see also State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980).

Rule 4(a) of the Tennessee Rules of Appellate Procedure requires the filing of a notice of appeal within thirty days of the entry of judgment or, pursuant to Rule 4(e), the entry of an order denying motion for new trial. Because the defendant's motion for new trial was a nullity, it did not toll the thirty-day period for filing the notice of appeal. Therefore, the notice of appeal in this case was also untimely. See, e.g., State v. Patterson, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997); Davis, 748 S.W.2d at 207. The timely filing of a notice of appeal is not a prerequisite to the jurisdiction of this court, and this court may waive the requirement in the interest of justice. Tenn. R. App. P. 4(a).

However, this court has warned “the bench and bar alike should be on notice that there is no automatic appeal of these issues to this [c]ourt.” State v. John A. Turbyville, No. E2002-00629-CCA-R3-CD, 2003 WL 21983022, at \*1 (Tenn. Crim. App. Aug. 21, 2003). In order to secure review of issues relating to the sufficiency of the evidence and sentencing, a timely filed notice of appeal must occur, or a waiver of the timely filed notice of appeal must be sought and obtained in this court. However, we note that the defendant failed to seek any review of the sufficiency of the

---

<sup>2</sup> The November 7 order also allowed trial counsel to withdraw from further representation of the defendant because he had been named the Chief Criminal Assistant District Attorney General of the Ninth Judicial District at some time during the pendency of the motion for new trial.

evidence or of the propriety of sentencing in this case. Therefore, because the notice of appeal was filed untimely and because the defendant has made no attempt to obtain a waiver from this court, we conclude that the appeal in this case shall be dismissed.

#### CONCLUSION

Because the motion for new trial was filed untimely in this case, we conclude that the defendant's issues on appeal have been waived. Furthermore, because the notice of appeal was also filed untimely and the defendant has not sought a waiver of timeliness with this court, we conclude that the appeal shall be dismissed.

---

D. KELLY THOMAS, JR., JUDGE